UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

United States of America,

Plaintiff,

v.

Niagara Mohawk Power Corporation,

Defendant.

COMPLAINT 1:14-CV-1266[GTS/TWD]

Plaintiff, the United States of America, on behalf of the Regional Administrator of the United States Environmental Protection Agency, Region 2 ("EPA"), by its undersigned attorneys, alleges as follows:

STATEMENT OF THE CASE

1. This is a civil action brought under Sections 106 and 107 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9606, 9607. The United States seeks injunctive relief requiring Defendant to perform certain response actions at the Niagara Mohawk Power Corporation Superfund Site ("Site"), located in the City of Saratoga Springs, Saratoga County, New York. The United States also seeks to recover costs incurred and to be incurred in conducting actions in response to the release or threatened release of hazardous substances at or from the Site.

JURISDICTION AND VENUE

2. This Court has jurisdiction over this action under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1345.

3. Venue is proper in this district under Section 113(b) of CERCLA, 42 U.S.C. § 9613(b), and 28 U.S.C. § 1391(b), because the release or threatened release of hazardous

substances that give rise to this complaint occurred in this district and because the Site is located in this district.

DEFENDANT

4. The Defendant named in this complaint is a "person" within the meaning of Section 101(21) of CERCLA, 42 U.S.C. § 9601(21).

5. The Defendant owns a portion of the Site within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

6. The Defendant operates, and at times relevant to this Complaint, operated a facility at a portion of the Site within the meaning of Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

STATUTORY FRAMEWORK

7. CERCLA was enacted in 1980 to provide a comprehensive governmental mechanism for abating releases and threatened releases of hazardous substances and other pollutants and contaminants and for funding the costs of such abatement and related enforcement activities, which are known as "response actions." 42 U.S.C. §§ 9604(a), 9601(25).

8. Under Section 104(a)(1) of CERCLA:

> Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment . . . .
>
> 42 U.S.C. § 9604(a)(1).

9. For CERCLA response actions and enforcement purposes, the Administrator of EPA is the President's delegate, as provided in operative Executive Orders, and, within certain limits, the Regional Administrators of EPA have been re-delegated this authority, which, in EPA Region 2, has been further re-delegated to the Director of the Emergency and Remedial Response Division.

GENERAL ALLEGATIONS

10. The Site is located in the City of Saratoga Springs, Saratoga County, New York.

11. The Site is defined by the extent of contamination associated with the past gas manufacturing operations by corporate predecessors of Niagara Mohawk Power Corporation ("Niagara Mohawk"). The Site includes an approximately 7-acre property that is owned by Niagara Mohawk (the "Niagara Mohawk Property"). The Niagara Mohawk Property is bounded on the north by Route 50, on the south by Excelsior Avenue, on the east by East Avenue and on the west by property previously owned by the former Spa Steel Products Company, Inc. ("Spa Steel Property"), and currently two parcels: one owned by Spa Hotel II, LLC containing a hotel, and the other by Saratoga Restaurant Hospitality LLC containing a restaurant. The Niagara Mohawk Property and certain other areas within the Site are referred to by EPA as Operable Unit 1 ("OU1"). The Site also includes an area that is approximately 0.5 acres in size and is bounded to the north by the former Spa Steel Property and the Niagara Mohawk Property, to the south by High Rock Avenue, to the east by Warren Street, and to the west by property owned by The Mill, LLC. This portion of the Site is referred to as Operable Unit 2 ("OU2"). OU2 contains: 1) a section of Excelsior Avenue; 2) a section of a paved parking lot owned by The Mill, LLC; and 3) a small green space owned by the City of Saratoga Springs that contains an active bedrock groundwater well, known as the Old Red Spring, and an associated pavilion.

12. Beginning in 1868, gas for use in lighting and heating was manufactured by corporate predecessors of Niagara Mohawk at the Niagara Mohawk Property. Niagara Mohawk's predecessor corporations owned the Site since 1868 and the first gas manufacturing plant at the Site was completed in 1873.

13. Niagara Mohawk's predecessor corporations began releasing hazardous substances at the Site from their gas manufacturing operations in approximately 1873.

14. The releases were comprised of coal tar, a dense, oily liquid, as well as other waste materials that were by-products of the gas manufacturing operations.

15. As a result of the gas manufacturing operations at the Site, there have been releases or threatened releases of hazardous substances into the environment at the Site resulting in soil, sediment, and groundwater contamination.

16. Analysis of samples from the Site confirmed the presence of hazardous substances, as defined by Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including, but not limited to, benzene, toluene, ethylbenzene and total xylenes (collectively known as BTEX), as well as polycyclic aromatic hydrocarbons ("PAHs").

17. The source of the BTEX and PAH contamination in the OU2 area of the Site is the coal tar, which has migrated through the subsurface of the Site from the OU1 area.

18. Pursuant to Section 105 of CERCLA, 42 U.S.C. § 9605, EPA placed the Site on the National Priorities List, set forth at 40 C.F.R. Part 300, Appendix B, in February 1990.

19. On May 15, 1997, a consent decree between the United States and the Defendant was entered by the Court for the Northern District of New York. That settlement, and Defendant's actions pursuant to the settlement, addressed the contamination associated with OU1 at the Site.

20. In July 2006, the contamination in the OU2 area was discovered.

21. Between July 2006 and 2013, the Defendant conducted a remedial investigation and a feasibility study to evaluate conditions at the Site and study potential cleanup remedies under EPA oversight.

22. On March 29, 2013, EPA issued a Record of Decision for OU2 ("OU2 ROD"), which selected a remedy to address the contaminated soil, sediment, and groundwater.

23. Among other things, the OU2 ROD calls for: removing contaminated soil; backfilling with clean soil; treating soil by enhancing the biodegradation of contaminants; plugging and abandoning the Old Red Spring well and installing a replacement with double casing; installing containment barriers to encapsulate soil; conducting long-term groundwater monitoring; implementing institutional controls; developing a site management plan; and restoring disturbed areas to pre-construction conditions.

24. The remedial action selected in the OU2 ROD is anticipated to have a capital cost of $4.6 million and a total present worth cost of $6.5 million, including $110,880 annually for operation and maintenance.

FIRST CLAIM FOR RELIEF

25. Paragraphs 1 through 26 are realleged and incorporated herein by reference.

26. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a) provides in pertinent part:

> (1) the owner and operator of a vessel or a facility,
> (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,…
>
> shall be liable for –
>
> all costs of removal or remedial action incurred by the United States Government . . . not inconsistent with the national contingency plan; . . . .

27. The Site is a facility within the meaning of Section 101(9) of CERCLA, 42 U.S.C. § 9601(9).

28. Hazardous substances, as defined in Section 101(14) of CERCLA, 42 U.S.C. § 9601(14), including, but not limited to, BTEX and PAHs, have been released at the Site, and/or there is a threat of such release at the Site, as defined by Section 101(22) of CERCLA, 42 U.S.C. § 9601(22).

29. The United States has incurred response costs for actions taken in response to the release or threat of release of hazardous substances with respect to OU2 at the Site through the date of filing of this complaint. The United States will continue to incur response costs in connection with OU2 at the Site in the future.

30. The United States' response actions taken with respect to OU2 at the Site and the costs incurred related to those actions are not inconsistent with the National Contingency Plan, which was promulgated under Section 105(a) of CERCLA, 42 U.S.C. § 9605, and is codified at 40 C.F.R. Part 300.

31. Defendant owns a portion of the Site and is therefore liable under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

32. Defendant operates and/or operated a facility at a portion of the Site and is therefore liable under Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1).

SECOND CLAIM FOR RELIEF

33. Paragraphs 1 through 32 are realleged and incorporated herein by reference. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), provides in pertinent part:

> [W]hen the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous

> substance from a facility, he may . . . secure such relief as may be necessary to abate such danger or threat . . . .

34. The President, through his delegate, the Director of the Emergency and Remedial Response Division of EPA, has determined that there is or may be an imminent and substantial endangerment to the public health or welfare or the environment because of a release of hazardous substances or a threatened release of hazardous substances at or from the Site.

35. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), authorizes the United States to bring an action to secure such relief as may be necessary to abate a danger or threat at the Site. In the OU2 ROD, EPA made determinations of the response actions necessary to abate a danger or threat with respect to soil, sediment, and groundwater contamination at the Site.

PRAYER FOR RELIEF

WHEREFORE, the United States respectfully requests that the Court:

1. Order the Defendant to perform the remedial design and remedial action for the remedy selected in the OU2 ROD for the Site;

2. Order the Defendant to reimburse the United States for all response costs incurred relating to OU2 at the Site, including interest, under Section 107(a) of CERCLA, 42 U.S.C. § 9607(a);

3. Enter a declaratory judgment on Defendant's liability that will be binding in any subsequent action for further response costs or for natural resource damages, pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2);

4. Award the United States its response costs in bringing this action, including the costs of attorney time; and

5. Grant such other and further relief as the Court deems appropriate.

Respectfully submitted,

ELLEN MAHAN
Deputy Section Chief
Environmental Enforcement Section

Date: 10/16/14

/s/ Bradley L. Levine

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